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Even as American attention is focused on Iraq's struggles to rebuild its political and legal systems in the face of violent sectarian divisions, another fractured society—Kosovo—has just begun negotiations to resolve the question of its political independence. The persistent ethnic divisions that have obstructed Kosovo's efforts to establish a multi-ethnic "rule of law" offer lessons in transitional justice for Iraq and other states.

In Kosovo today, two parallel judicial systems each claim absolute and exclusive jurisdiction over the province. One system is sponsored by the United Nations administration in Kosovo and is mostly, although not exclusively, staffed by Kosovar Albanians. The other system, run primarily by Kosovar Serbians, is essentially a set of courts-in-exile, the remnants of the previous judicial system that existed before the Serbian government was forced out of Kosovo by NATO bombing in 1999.

The parallel courts present a transitional justice issue that is as crucial to rebuilding Kosovo's post-conflict society as convening a truth commission or conducting criminal trials. On one level, the existence of the parallel courts is a manifestation of the ongoing political dispute over sovereignty. But for the residents of Kosovo, the lack of any recognition of judgments between these systems has also created legal chaos in their everyday lives. Conflicting judgments have been issued in civil cases, and criminal defendants are subject to prosecution and punishment in both systems. The palpable injustices that result from these conflicting judgments and repeated trials are undermining confidence in the ongoing process of legal and political transition.

This Article undertakes an assessment of Kosovo's parallel systems and of the existing legal models for recognition and enforcement of judgments, with the aim of proposing an appropriate framework for Kosovo to recognize the Serbian parallel judgments. Each of the relevant national and international models for recognition strives to strike a balance between two competing values: (1) achieving certainty in the finality and consistency of legal judgments; and (2) ensuring those judgments' essential fairness. Using these two values as a guide, this Article assesses whether and how the existing models might be adapted to Kosovo's context, concluding that the proper balance between legal certainty and fairness will permit categorical recognition of most parallel civil judgments, but will require case by case, discretionary review of criminal judgments. Finally, from this analysis, this Article develops a set of factors for other transitioning states to consider when faced with judgments from ethnic and religious legal institutions or other parallel courts.

Pacta sunt servanda, the cardinal rule of international law, prohibits the breaking of agreements. But what role should international law play in the making of agreements? From late 1999 to early 2001, when Palestinians and Israelis undertook to negotiate a "permanent status" agreement that would bring their century-long conflict to an end, they expressed differing views not only about their respective rights and obligations under international law, but also, more fundamentally, about the relevance of international legal norms to the bilateral negotiation process in which they were engaged. Although a rich body of literature has emerged around the parties' substantive legal claims, what continues to be missing from the discussion is a theoretical framework for explaining the functions of

law in international peace negotiations and a detailed analysis of the functions international law actually served in Palestinian-Israeli peace talks.

This Article is intended to help fill these gaps. Part II introduces a framework for analyzing how law functions in international bargaining, and revisits the critical insight that parties bargain "in the shadow of the law," in that "the outcome that the law will impose if no agreement is reached gives each [party] certain bargaining chips" in negotiations. This approach facilitates an examination of how legal rules function to promote efficiency and fairness by narrowing the scope of bargaining, framing trade-offs, providing objective standards for evaluating competing claims, and filling in gaps in an agreement. This Article then turns to exploring how these functions translate to the international setting. "The shadow of the law" is diminished at the international level, where norms are often under-developed and the adjudication and enforcement of legal rights tends to be a remote prospect. However, the "shadow" metaphor fails to capture an important function of law in international bargaining. As a growing body of literature suggests, the influence of legal rules also derives from the normative force of the ideas it embodies and its capacity to legitimize negotiated outcomes in the eyes of other international actors and domestic constituencies. In this respect, international law may influence the outcome of negotiations not only as a result of the shadow it casts, but also as a result of the shade it offers—i.e., the attributes of legal rules that pull parties to align a negotiated outcome with them, even when their ultimate enforcement is unlikely.

Applying this framework, Part III describes how law functioned—and failed to—during Palestinian-Israeli permanent status negotiations. This analysis draws not only on published accounts of the negotiations, but also on unpublished drafts, memoranda, and minutes prepared by and for the Palestinian negotiating team during the talks. Finally, this Article assesses the factors that constrained the functioning of legal rules in Palestinian-Israeli peace talks, analyzing the consequences of the parties' disagreements about the applicability and determinacy of legal rules and about the efficacy of the outcomes they were claimed to prescribe, as well as the lack of recourse to external adjudication and enforcement. It concludes by suggesting steps that may be taken by the parties and the international community to address these factors.

Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties

Scott Vesel

International investment law is perhaps the most dynamic area of international law at the beginning of the twenty-first century. Since the creation of the International Center for the Settlement of Investment Disputes (ICSID) in 1965, individual investors have had access to a neutral, international forum where they can bring claims in arbitration against sovereign states—provided the host state has consented to the jurisdiction of ICSID in a treaty with the investor's home state.

Foreign investors strongly prefer international arbitration to litigation in the courts of the host state, which are often biased and almost always slow. Consequently, they have employed a variety of arguments to gain access to ICSID arbitration or to improve the terms of such access beyond what is provided for in the bilateral investment treaty (BIT) between their home state and the host state.

In particular, a number of investors have invoked the most-favored-nation (MFN) clause of their home state's BIT with the host state in order to justify access to the more favorable dispute settlement provisions of a separate treaty between the host state and a third state. These arguments have generated significant controversy—and seemingly contradictory decisions—from the tribunals called upon to hear them.

Although, in the author's view, the recent arbitral decisions have generally reached the correct results, the reasoning of the decisions has often been perfunctory, incoherent, or, on occasion, dangerous. This Article seeks to provide these decisions with a firmer foundation by analyzing the recent decisions in light of the historical development of both the most-favored-nation clause and the field of international investment law. When viewed in this context, the decisions no longer appear incompatible but rather the product of tribunals deciding cases according to the specific texts of the relevant treaties and the factual circumstances of the parties—despite what one might be led to believe by reading the texts of the decisions themselves.

which the Parliaments in Canada and the United Kingdom can correct judicial missteps affords those countries a flexibility to experiment with terrorism trials that the United States lacks.

This comparative analysis, in turn, suggests that those who are outraged at the U.S. government's approach may have more effective levers with which to change policy than the Due Process Clause. This Note proposes both judicial and legislative fixes. On the one hand, courts could use the same Fourth Amendment framework they use to evaluate programmatic searches to discern whether immigration law is really being used for immigration purposes. On the other hand, perhaps it is time for Congress to raise a wall between criminal law enforcement and immigration law enforcement, similar to the one the Foreign Intelligence Surveillance Act creates between prosecutors and the intelligence community.